IN THE

Supreme Court of the United States

October Term, 1968

No. 200

BEN H. FRANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*

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Questions Presented

1. Whether a defendant who was convicted of an offense for which up to six months' imprisonment could have been imposed was entitled to a jury trial under the Sixth Amendment merely because after the conviction the court placed him on probation for three years?

2. Whether a constitutional holding by this Court in petitioner's favor should be applied retroactively to other cases that were already tried under a different rule?

Interest of *Amicus*

In New York State, as in the federal jurisdiction and most states throughout the country, the legislature has provided that a court imposing sentence upon a convicted defendant is not obliged to order imprisonment, but instead my direct that the offender be placed on probation for a specified period. In New York, a person convicted of a Class "B" misdemeanor—a crime carrying a maximum sentence of three months' imprisonment—is subject to probation for a maximum of one year [N.Y. Penal Law §§65.00(3)(c), 70.15(2)]. A conviction for a Class "A" misdemeanor—carrying a maximum prison term of one year—allows probation for up to three years [N.Y. Penal Law §§65.00(3)(b), 70.15(1)].

Petitioner in effect urges that the Sixth Amendment requires a jury trial if the actual or potential probation is longer that the permissible term of imprisonment that could be imposed without a trial by jury. Every year thousands of such cases are tried in the New York City Criminal Court before one or three judges without a jury [see N. Y. C. Crim. Ct. Act §40]. If petitioner's Sixth Amendment view were accepted, and the decision were applied to cases already tried, hundreds of thousands of convictions would have to be reopened and nullified, not only in New York, but in many other states and the federal courts. We therefore join the Solicitor General in urging the Court to reject petitioner's strained constitutional theories.

ARGUMENT

POINT I

The availability of probation after criminal conviction does not reflect the seriousness of the offense under the Sixth Amendment.

Petitioner claims that the imposition of probation for three years in his case is equivalent, for purposes of the jury trial provision of the Sixth Amendment, to a term of imprisonment for that period. Thus, he argues, he was entitled to a jury trial even though his underlying act could subject him to imprisonment for no longer than six months. The error in his argument is clear. The term of probation is distinct from the term of imprisonment, for only the latter indicates the seriousness of the crime under the Sixth Amendment.

Petitioner's caustic view of probation is hardly shared by the community at large, or by the courts, defense lawyers and prosecutors who administer the system of criminal justice. To the layman and the criminal law specialist probation means minimal supervision, its sporadic, mild restraints not at all comparable to the constant, thorough strictures of incarceration. Nor is petitioner's grim view of probation shared by the prisoners from whose ranks petitioner was solicitously excluded by the District Court. What defendant, arraigned for sentence, would consider three years' probation as serious a "punishment" as continuous imprisonment for six months? What prospective employer, or neighbor of the defendant, would view

three years' probation equally as indicative of the "seriousness" of his offense as six months' incarceration? Probation is, to some extent, a restriction on convicted defendants, but the restraint and "custody" entailed by probation cannot be equated with the restraints of incarceration.

Moreover, probation is not punitive; as the thoughtful brief of the Solicitor General sets forth, probation has been developed as a rehabilitative technique, to mitigate and supplant the punitive measures traditionally available. The principal aims of punishment are, as a sanction, to deter criminal conduct, and to preserve community confidence in the efficacy of the basic norms of society. The jury's function, as embodied in the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, relates to the determination whether the defendant has committed an act which authorizes the infliction of such a sanction. The common law jury plays no part in decisions relating to the suitability of probation, and, of course, as the Solicitor General sets forth probation was virtually unknown until after the Fourteenth Amendment was enacted.

While the length of potential imprisonment has been deemed by this Court a significant index of the attitude of a locality with respect to the seriousness of a particular crime, the length of potential probation reflects nothing of the sort. It deals with the offender, not the offense. Since the jury is concerned only with the offense, not the offender, there is no constitutional requirement of a jury trial merely because a criminal conviction is, in our system of justice, generally a precondition for the availability of probation.

The irrelevancy of probation in determining whether a crime is serious in Sixth Amendment terms is illustrated

by the applicability of probation in New York State to persons convicted of crimes that are unquestionably serious. For example, a conviction for robbery in the first degree, carrying a maximum penalty of 25 years' imprisonment [N.Y. Penal Law §§70.00(2)(b), 165.15], still permits the court to order probation for up to five years in lieu of imprisonment [N.Y. Penal Law §65.00(3)(a)]. Clearly, robbery and similar felonies are serious crimes, a status undiminished by the decision of the state legislature to make available to the court the flexibility afforded by probation. This flexibility in treating the offender rather than the offense is also reflected in New York State's provisions for "conditional" or "unconditional" discharge [N.Y. Penal Law §§65.05, 65.20]. There again, modern theories of correction have led to new techniques for rehabilitation, supplementing the traditional sanction of imprisonment, while in no way indicating a change in the community attitude toward the seriousness of the crime.

POINT II

If this Court holds that a jury trial was constitutionally required in this case, the holding should not be retroactive.

If, contrary to the arguments of the Solicitor General and *amicus*, this Court accepts petitioner's apparent view of the Sixth Amendment, the question of retroactivity would arise. The familiar considerations reviewed frequently by this Court in determining whether particular constitutional rulings should be retroactive point unmistakably to the prospectivity of a ruling in favor of this petitioner.

When, in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), this Court ruled that the Sixth Amendment right to trial by jury applied to the states, the Court held that this decision would apply only to cases in which the trial was begun after the date of the *Duncan* decision [*De Stefano* v. *Woods,* 392 U. S. 631 (1968)]. Similarly, a broadening of the Sixth Amendment along the lines proposed by petitioner herein should apply only to his case, and to trials begun after this new ruling. The factors which called for the prospectivity of the *Duncan* decision also apply here. Drastic disruption of the administration of justice would flow from applying the new ruling to cases already tried. Hundreds of thousands of federal and state convictions would be needlessly overturned, the cases reopened. This chaos would not be required by justified concern that the fact-finding process previously employed, a trial without a jury, was unreliable. There has been no proof that verdicts of guilt rendered by juries are generally more reliable than findings of guilt handed down by federal or state courts,* or even that judges are more likely to convict than juries.** Finally, it is indisputable that federal and state courts and prosecutors justifiably relied on the conclusion that a jury trial was not constitutionally required merely because probation was one of the alternatives for treating the convicted offender.

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* This Court's preference for judges over juries in passing upon questions of fact raised by constitutional claims was expressed in *Jackson* v. *Denno,* 378 U. S. 368 (1964).

** The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N. Y. Sept. 14, 1968, reprinted in N.Y.L. Jour., Sept. 25, 1968, p. 1.

It might be argued, however, that if petitioner's Sixth Amendment views are accepted, this Court's ruling should apply to all state cases tried since the *Duncan* decision, on the theory that this Court's ruling would stem from *Duncan*. Such a cut-off date would be totally unwarranted. To begin with, there was no indication in the *Duncan* opinion that a jury trial is entailed by *Duncan* solely because of the length of actual or available probation. Furthermore, as to federal prosecutions *Duncan* made no new departure. The Sixth Amendment right to trial by jury has always applied to cases tried in the federal courts, and no change in the content of that right was undertaken; rather, in *Duncan* the Court expressly declined to pass upon questions as to the meaning of the common law right to trial by jury. Similarly, nothing was said in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), bearing upon the relevancy of probation under the Sixth Amendment. The instant case, not *Duncan* or *Cheff*, would be the case that changed the content of the Sixth Amendment as it affects the relevancy of probation. Thus, these cases would not be a necessary basis of the new ruling proposed by petitioner, and the dates of these cases would be irrelevant to the question of retroactivity.

Even if *Duncan* or *Cheff* were considered a stepping-stone in the new direction pointed out by petitioner, there is ample precedent for holding that petitioner's case, not any prior case, would be the appropriate landmark for determining which cases should be affected by the new rule. This Court has frequently chosen the date of a new decision, not previous cases on which it was based, as a cut-off date for its applicability. For example, when this Court

ruled in *Malloy* v. *Hogan* [378 U.S. 1 (1964)] that the Fifth Amendment privilege against self-incrimination was applicable to the states, it was a foregone conclusion that state judges and prosecutors would soon be barred from commenting at trial upon the defendant's failure to testify. Yet, when this Court did hold that such comment was forbidden, in *Griffin* v. *California* [380 U.S. 609 (1965)], that holding was not applied to cases that were already final, even if such cases were tried after *Malloy* v. *Hogan* [*Tehan* v. *Shott*, 382 U.S. 406 (1966)]. Similarly, *Miranda* v. *Arizona* [384 U.S. 436 (1966)], was an outgrowth of *Malloy* v. *Hogan* and of rulings applying the Sixth Amendment right to counsel, including *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). But *Miranda* was not applied to cases tried prior to its announcement [*Johnson* v. *New Jersey*, 384 U.S. 719 (1966)]. Sixth Amendment rulings were also the foundation of *United States* v. *Wade* [388 U.S. 218 (1967)], which held that the right to counsel attached at a line-up [see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Escobedo* v. *Illinois*, *supra*]. But here again the decision was held inapplicable to cases arising previously, even though such cases might have arisen after *Gideon* and *Escobedo*.

Therefore, if the Sixth Amendment were held to require a jury trial solely because of the length of permissible probation, that ruling should not apply to cases that have already been tried. In so urging, we mean to suggest not one whit that there is any merit to petitioner's interpretation of the Sixth Amendment.

Conclusion

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed; if that judgment is reversed on constitutional grounds, this Court's holding should not apply to cases that have already been tried.

Respectfully submitted,

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